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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals of Texas

WALTER FISK,
Appellant
v.
THE STATE OF TEXAS,
Appellee

State's Brief on the Merits
from the
Fourth Court of Appeals, San Antonio, Texas,
No. 04-17-00174-CR
Appeal from Bexar County

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IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

The trial judge below was the **Honorable Kevin M. O'Connell**, Presiding Judge of the 227th Judicial District Court, Bexar County, Texas.

The parties to this case are as follows:

1) **Walter Fisk** was the defendant in the trial court and appellant in the court of appeals, and he is the respondent to this Honorable Court.

2) **The State of Texas**, by and through the Bexar County District Attorney's Office, prosecuted the charges in the trial court, was appellee in the Court of Appeals, and is the petitioner to this Honorable Court.

The trial attorneys were as follows:

1) Walter Fisk was represented by **Jesse Hernandez**, 7143 Oaklawn Drive, San Antonio, TX 78229, and **John Paul Young**, P.O. Box 700713, San Antonio, TX 78270.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, and **Anna Scott**, **Sade Mitchell**, and **Andrew Warthen**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, TX 78205.

The appellate attorneys are as follows:

1) Walter Fisk is represented by **Michael Robbins**, Assistant Public Defender, Paul Elizondo Tower, 101 W. Nueva Street, Suite 310, San Antonio, TX 78205.

2) The State of Texas is represented by **Nicholas "Nico" LaHood**, District Attorney, and **Andrew N. Warthen**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, Texas 78205.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

Other

STATEMENT OF THE CASE

Appellant was convicted of three counts of indecency with a child by contact. (CR 126-27, 137-40.)[1] At sentencing, a former military judgment was entered into evidence showing that appellant had previously been convicted of the military offense of indecent acts and liberties with a child. Finding that that military offense was substantially similar to Texas's indecency-with-a-child statute, the trial court sentenced appellant to three consecutive life sentences. (CR 126-27, 137-40.) However, the court of appeals disagreed, and reversed and remanded for a new punishment hearing. *Fisk v. State*, 510 S.W.3d 165 (Tex. App.—San Antonio 2016, no pet.).

At the second punishment hearing, the trial court determined that the former military sodomy statute, which appellant was also previously convicted of, was substantially similar to Texas's sexual-assault statute. (CR 175-79; RR1 36.) Thus, it again sentenced appellant to three consecutive life sentences. (CR 181-86; RR1 36-37.) As before, the court of appeals disagreed, reversed appellant's life sentences, and remanded for another sentencing hearing. *Fisk v. State*, No. 04-17-00174-CR, 2017 Tex. App. LEXIS 11311 (Tex. App.—San Antonio Dec. 6, 2017, pet. granted).

[1] The Reporter's Record will be referenced as "RR," followed by its respective volume number. The Clerk's Record will be referenced as "CR." Exhibits will be referenced as "Ex.," followed by their respective number.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was requested and granted.

ISSUES PRESENTED

1. The current test for determining whether an out-of-state offense is substantially similar to an enumerated Texas offense is too broad. Accordingly, this Court should disavow that test and replace it with one that only compares the elements of the respective offenses.

2. Even if not disavowed, the court of appeals misapplied the current test when it concluded that the military's former sodomy-with-a-child statute is not substantially similar to Texas's sexual-assault statute.

STATEMENT OF FACTS

The specific facts adduced at the guilt/innocence phase of trial have no bearing on the issues before this Court. Thus, this brief will not belabor the Court with an in-depth recitation of those facts. Suffice it to say, appellant was found guilty of three counts of indecency with a child for touching H.W. and S.W., the victims. Those convictions were affirmed on appeal by the court of appeals, and appellant did not seek further review of that holding. But, as explained above, the court of appeals remanded the case for a new hearing on punishment.

At the beginning of the second punishment hearing, the State asked the trial court to "take judicial notice of the 1984 version of the Uniform Code of Military Justice," and the trial court did so. (RR1 5-6.) Among other exhibits, the trial court admitted State's Exhibit P3, which was a sworn records affidavit, certified copy of appellant's court-martial convictions, and the judgment affirming those convictions. (RR1 15-16; State's Ex. P3.) Exhibit P3 showed that, among other convictions, appellant was found guilty of Article 125 of the Uniform Code of Military Justice ("UCMJ"), which was the military sodomy statute in effect at the time of his court-martial conviction. (State's Ex. P3 at 3.) His victim was "a child under the age of 16 years." (State's Ex. P3 at 3.)

The State then called Major Jacquelyn Christilles of the United States Air

Force Reserves, an Assistant Staff Judge Advocate, as an expert in military law.[2] (RR1 17.) Major Christilles was presented with State's Exhibit P4, a portion of the 1984 Manual for Courts-Martial—specifically ¶ 51, the portion outlining the military sodomy statute. (RR1 18; State's Ex. P4.) While the exhibit was never entered into evidence, the Major utilized this exhibit during her testimony. (RR1 18-24.)

Major Christilles explained that the UCMJ has certain "punitive articles," of which Article 125 is one. (RR1 21.) She further explained that the offense that appellant was charged with and found guilty of required a certified judge advocate to prove beyond a reasonable doubt that the accused engaged in unnatural carnal copulation with another person or an animal, and that the prohibited act was done with someone under the age of 16. (RR1 21-23; *see also* State's Ex. P4, ¶ 51(b)). She also delineated what constituted "unnatural carnal copulation." (RR1 22; *see also* State's Ex. P4, ¶ 51(c)). Finally, the major explained that the punishment for violating Article 125 was forfeiture of all pay and allowances, confinement for 20 years, and dishonorable discharge from the military, which is "the most severe punitive discharge that the [UCMJ] allows." (RR1 23-24; *see also* State's Ex. P4, ¶ 51(e)(2)).

[2] As noted at the beginning of her testimony, Major Christilles is also currently employed by the Bexar County District Attorney's Office as an attorney in the Civil Division. (RR1 17-18.) She affirmed that her employment would not influence her testimony. (RR1 17.)

After reviewing Article 125 and § 22.011 of the Texas Penal Code, Major Christilles opined that the two statutes "are substantially similar," and outlined her reasoning. (RR1 25-27.) The trial court agreed and sentenced appellant to three life sentences. (RR1 36-37.)

SUMMARY OF THE ARGUMENT

This Court should circumscribe the test currently used to determine substantial similarity between the elements of Texas and out-of-state offenses. Specifically, only the elements of the offenses being compared should be considered, not the interests advanced or the class, degree, and punishment range of the two offenses.

In any event, whether the test is reined in or not, the court of appeals erred when it determined that the military offense appellant was previously convicted of was not substantially similar to Texas's sexual-assault statute because the two statutes' elements are substantially similar, as are the interests advanced and the relevant punishments.

ARGUMENT

I. The *Prudholm-Anderson* test for determining whether an out-of-state offense is "substantially similar" to an enumerated Texas offense goes beyond what is required by the plain language of § 12.42(c).

The court of appeals applied the current test for determining substantial similarity. As outlined below, this Court should take this opportunity to scale back that test to one that, as mandated by the statute, compares only the elements of the relevant Texas and out-of-state offenses.

a. Applicable law

1. Section 12.42 of the Texas Penal Code

"Penal Code Section 12.42 provides enhanced penalties for repeat felony offenders." *Prudholm v. State*, 333 S.W.3d 590, 592 (Tex. Crim. App. 2011). "Section 12.42(c)(2) effectively creates a 'two-strikes policy' for repeat sex offenders in Texas, embodying the legislature's intent to treat repeat sex offenders more harshly than other repeat offenders." *Id*. "Section 12.42(c)(2) mandates a life sentence for a defendant convicted of a sexual offense listed in Section 12.42(c)(2)(A) that he committed after having been previously convicted of any of the enumerated sexual offenses in Section 12.42(c)(2)(B), or 'under the laws of another state containing elements that are *substantially similar* to the elements of an [enumerated] offense.'" *Id.* (quoting Tex. Penal Code Ann. § 12.42(c)(2)(B)(v)). Convictions under the UCMJ are convictions under the law of

another state requiring life sentences. *Rushing v. State*, 353 S.W.3d 863, 863-68 (Tex. Crim. App. 2011).

In this case, appellant was convicted of § 21.11(a)(1) of the Penal Code, which is an offense listed under § 12.42(c)(2)(A). Further, § 22.011, the Texas sexual-assault statute, is an enumerated previous-conviction offense, Tex. Penal Code Ann. § 12.42(c)(2)(B)(ii), and is the offense that the trial court found was substantially similar to the relevant military offense.

2. Substantial similarity

This Court has outlined a two-step process for determining whether an out-of-state sexual offense contains substantially similar elements to a listed Texas offense.

First, "the elements being compared must display a high degree of likeness." *Anderson v. State*, 394 S.W.3d 531, 535 (Tex. Crim. App. 2013) (internal quotation marks and alterations omitted). "But the elements may be less than identical and need not parallel one another precisely." *Id*. (internal quotation marks omitted). "It is not essential that a person who is guilty of an out-of-state sexual offense would necessarily be guilty of a Texas sexual offense as there is no requirement of a total overlap, but the out-of-state offense cannot be markedly broader than or distinct from the Texas prohibited conduct." *Id*. at 535-56. That is, "[t]he fact that some conduct that falls within the out-of-state offense also falls

within the Texas offense does not automatically mandate a finding that the elements are substantially similar." *Id*. at 539 n.37. "Nor is it dispositive that some conduct that falls within the out-of-state offense falls outside the Texas statute." *Id*. "It is the degree of overlap that is crucial, not the fact of some overlap." *Id*. Moreover, "[g]enerally speaking, the focus of the ["substantially similar"] inquiry is on the *elements* of the offense, not the specific conduct that was alleged." *Id*. at 536.

Second, "the elements must be substantially similar with respect to the individual or public interests protected and the impact of the elements on the seriousness of the offenses." *Id*. (internal quotation marks omitted). "This is itself a two-step analysis." *Id*. "Courts must first determine if there is a similar danger to society that the statute is trying to prevent." *Id*. That requires a court to ask, "[W]hat specific interest is the statute advancing?" *Id*. at 539. "The court must then determine if the class, degree, and punishment range of the two offenses are substantially similar." *Id*. at 536 (internal quotation marks omitted).

"No single factor in the analysis is dispositive, so a court must weigh all factors before making a determination." *Id*. at 537.

b. The above-outlined test goes beyond what the statute requires

As can be seen above, the test outlined by this Court when determining substantial similarity goes well beyond comparing the offenses' elements. In addition to the elements of the offenses, it seeks to determine whether the two statutes protect against similar dangers to society, and compares the "class, degree, and punishment range" of the two offenses. This Court first added the second prong in *Prudholm* when it looked to § 1.02 of the Penal Code, which delineates the objectives of the Penal Code. *Prudholm*, 333 S.W.3d 594-95 (quoting Tex. Penal Code Ann. § 1.02(3)). But little analysis of *why* that was done is provided.

Certainly, as § 1.02 itself states, the objectives of the Penal Code should be kept in mind when construing its provisions. Tex. Penal Code Ann. § 1.02 ("To this end, the provisions of this code are intended, and shall be construed, to achieve the following objectives . . . ."). Thus, if there are two ways to read a Code provision—one that meets the objectives, and another that contravenes them—then the meaning that best conforms to the objectives should win the day. However, objectives do not give license to go beyond the language of any given statutory provision. The legislature specifically mandated life sentences for persons previously convicted of out-of-statute offenses that had substantially similar *elements*. If it wanted individual and public interests and elemental impact to be considered, it could have stated that in the statute. It did not.

And comparing such considerations is problematic. First, what one state considers important may not be given much consideration at all by another. For example, § 12.42(c)(2)(B)(ii) lists the prohibited-sexual-conduct statute as an enhancement offense. That statute prohibits sexual intercourse or deviate sexual intercourse between certain family members. Tex. Penal Code Ann. § 25.02(a). Most of the listed prohibitions are punished as a third-degree felony (except intercourse between ancestors and descendants, which is punished as a second-degree felony). *Id*. § 25.02(c). Whether the family member is related by blood or adoption is not a relevant consideration for most of the types of family relationships. For instance, adopted siblings who engage in intercourse are subject to the same third-degree punishment range as blood-related siblings.

But let us presume that another state prohibited sexual intercourse between adopted siblings using the same or substantially similar elements as § 25.02, but the out-of-state offense was only the equivalent of a Class-B misdemeanor in that state because, considering that there would not be a corruption of the genetic pool, the other state did not feel a greater punishment was warranted between adopted siblings. Should it matter that the punishment range is much lower or that the interests likely to be protected are different? Under § 12.42(c), the answer is no. Since the elements between such an out-of-state offense and § 25.02 are the same or substantially similar, a life sentence is warranted because with § 12.42(c) the

legislature was concerned with enhancing the punishment of those convicted of crimes with similar elements, not crimes with similar purposes or punishments.

Second, the expanded test ignores that, as the concerns of society change, statutory purposes and punishment ranges often drastically modify over time—as the out-of-state offense in this case demonstrates. Article 125 of the 1984 UCMJ provided for a maximum twenty-year term of confinement if one committed sodomy by penetrating another's anus by force and without consent. (RR1 23-24; State's Ex. P4, ¶ 51(e)(1)).[3] Since that time, forcible anal penetration has been re-codified under the military rape statute, 10 U.S.C.A. § 920(a) (West Supp. 2017), and the maximum term of imprisonment is now life. *2016 Manual for Courts-Martial*, Part IV, Art. 120, ¶ 45(e)(1).[4] Thus, as can be seen, the military now takes a much harsher attitude towards forcible anal rape. Texas, meanwhile, still generally punishes sexual assault as a second-degree felony with a maximum punishment of twenty years.[5] Tex. Penal Code Ann. § 22.011(f); Tex. Penal Code Ann. § 12.33.

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[3] The full version of the 1984 Manual for Courts-Martial can be found online. *See* https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1984.pdf. Paragraph 51, the provision of the Manual at issue in this case, can be found at pages 390-91 of the PDF file.

[4] Like the 1984 Manual, the 2016 version can be found online. *See* http://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf?ver=2016-12-08-181411-957. The maximum punishment provisions for rape can be found on page 375 of the PDF file.

[5] Admittedly, there is some overlap between the military rape statute and Texas's aggravated-sexual-assault statute, which is normally a first-degree felony. Tex. Penal Code Ann. § 22.021(e).

But that should not matter. If one commits an out-of-state offense with substantially the same elements as an enumerated Texas offense, it is irrelevant that the other state decided to relax or strengthen that offense's punishment. What matters is that the elements of the two offenses are generally comparable so that if a mandatory life sentence is imposed on a repeat sex offender we can be confident that his conduct is not too far removed from our own penal laws.

Likewise concerning the interests protected. As the court of appeals noted, the military sodomy law applied to a range of conduct that is not illegal here in Texas because one of the purposes of older sodomy laws was to protect against non-procreative sex, "regardless of whether the non-procreative sexual activity was between consenting adults." *Fisk v. State*, No. 04-17-00174-CR, 2017 Tex. App. LEXIS 11311, at *20 (Tex. App.—San Antonio Dec. 6, 2017, pet. filed). That may be, but it does not change the fact that sodomy of a child was also proscribed by Article 125. The purpose of proscribing sodomy with children was certainly not to encourage procreative sex with them, but, rather, to protect children from those who would subject them to oral and anal sexual assault. But even if the military's purpose was solely to prevent non-procreative sexual intercourse, (as explained more below) the elements of that offense were still substantially similar to Texas's sexual-assault statute—and that is the only consideration called for by § 12.42(c)(2)(B)(v).

Because the *Prudholm-Anderson* test goes beyond what is mandated by the plain language of § 12.42(c), and because those extra-textual considerations are problematic, this Court should take this opportunity to rein the test in.

II. Whether applying the modified or current test, the court of appeals erred when it concluded that the military's previous sodomy-with-a-child statute is not substantially similar to Texas's sexual-assault statute.

The trial court compared the 1984 version of Article 125, the military sodomy statute, and § 22.011, the Texas sexual-assault statute. While the court of appeals determined that the punishments are "extremely similar," it also concluded that "the elements and the interests protected by the two statutes are not." *Fisk*, 2017 Tex. App. LEXIS 11311, at *22. Thus, it reversed the trial court. As explained below, whether applying the circumscribed test discussed above or the current test, the court of appeals erred.

a. The relevant statutes and what is compared to determine substantial similarity

1. Section 22.011 of the Texas Penal Code

Section 22.011 of the Penal Code states:

> (a) A person commits an offense if the person:
>
> (1) intentionally or knowingly:
>
> (A) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent;
>
> (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or
>
> (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth,

> anus, or sexual organ of another person, including the actor; or
>
> (2) intentionally or knowingly:
>
> (A) causes the penetration of the anus or sexual organ of a child by any means;
>
> (B) causes the penetration of the mouth of a child by the sexual organ of the actor;
>
> (C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
>
> (D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
>
> (E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

Tex. Penal Code Ann. § 22.011(a). Section 22.011 defines "child" as "a person younger than 17 years of age." *Id.* § 22.011(c)(1).

By default, § 22.011(a) is a second-degree felony.[6] Tex. Penal Code Ann. § 22.011(f). Second-degree felonies are punishable by 2-20 years' imprisonment, and can also include a fine of up to $10,000. Tex. Penal Code Ann. § 12.33.

[6] Under certain circumstances not relevant to this case, a violation of § 22.011(a) is a first-degree felony if the actor and victim were engaged in a bigamous relationship. Tex. Penal Code Ann. § 22.011(f); *see also Arteaga v. State*, 521 S.W.3d 329 (Tex. Crim. App. 2017) (holding that a conviction for sexual assault can only be punished as a first-degree felony if the actor was prohibited from marrying the victim because such a marriage would constitute a bigamous relationship, not because the actor would be prohibited from marrying the victim for some other reason, such as consanguinity or, presumably, because she was a minor).

2. Article 125 and the Manual for Courts-Martial

The full text of Article 125 in force at the time of appellant's conviction, which was codified in the United States Code, was:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

10 U.S.C.A. § 925 (West 2010) (amended 2013) (current versions at 10 U.S.C.A. §§ 920b, 925 (West 2017)); (*see also* State's Ex. P4, ¶ 51(a)). Moreover, at the time of appellant's military conviction, the UCMJ stated, "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." 10 U.S.C.A. § 856 (West 2010) (amended 2013) (found in *1984 Manual for Courts-Martial*, App. 2, Art. 56 (located on p. 482 of the 1984 Manual cited in footnote 3, *supra*)). Such delegation to the president to set maximum punishments "is inherent in the nature of the relationship between Congress and the President in fulfilling their jointly-shared responsibilities to provide for the nation's defense." *United States v. Turner*, 30 M.J. 1276, 1283 (N-M.C.M.R. 1990).

How Article 125 was enforced by the military justice system requires an explanation of the Manual for Courts-Martial. The Manual is a comprehensive

rule book and guide for the military justice system which "has the force of law[.]" *Noyd v. Bond*, 395 U.S. 683, 692 (1969); *see also United States v. Kelson*, 3 M.J. 139, 140-41 (C.M.A. 1977) ("A valid Manual provision . . . has the force and effect of law."). The 1984 version consists of five parts and a multitude of appendices. *See* footnote 3, *supra*. Exhibit P4 was taken from Part IV, the punitive-articles section, which includes ¶ 51. In addition to the text of the statute, recounted above, the portions relevant to the substantial-similarity analysis are ¶ 51's explanation, elements, and maximum-punishment sections.

Generally, sodomy was committed if "the accused engaged in unnatural carnal copulation with a certain other person or with an animal." (State's Ex. P4, ¶ 51(b)(1)). Unnatural carnal copulation occurred if:

i. A person took into that person's mouth or anus the sexual organ of another person or of an animal;

ii. Placed that person's sexual organ in the mouth or anus of another person or of an animal;

iii. Had carnal copulation in any opening of the body, except the sexual parts, with another person; or

iv. Had carnal copulation with an animal.

(RR1 22; *see also* State's Ex. P4, ¶ 51(c)). That "explanation" of Article 125's phrase "unnatural carnal copulation" derived from a combination of military case-

law precedent and a definition of the phrase found in the District of Columbia Code, which at the time was enacted by Congress. *United States v. Harris*, 8 M.J. 52, 53-58 (C.M.A. 1979) (meticulously outlining the meaning of "unnatural carnal copulation" and its origins); *cf. Prudholm*, 333 S.W.3d at 597 (utilizing definition of the phrase "unlawfully restrained" derived from California case law because the phrase was not defined by statute).

Further, additional "elements"—the victim was under the age of 16, or the act was done by force and without the victim's consent—would also have to be proven by the prosecution if they were applicable. (RR1 23; *see also* State's Ex. P4, ¶ 51(b), (e)); *United States v. Miller*, 3 M.J. 292, 293 (C.M.A. 1977) (explaining that, just as with the congressionally delineated elements, the United States bears the burden of proof to establish the additional elements).

Concerning the child-under-16 element at issue in this case, the United States Court of Appeals for the Armed Forces has explained that the literal text of Article 125 "does not specifically address the age of the child for the aggravated offense of sodomy with a child . . . ." *United States v. Wilson*, 66 M.J. 39, 41-42 (C.A.A.F. 2008). But the *Wilson* Court went on to explain that "the description of the offense in Article 125, UCMJ, does not end our textual analysis." *Id*. at 42. Instead, "the President may set different maximum authorized punishments for an offense based on specific facts." *Id*. "In the case of Article 125, UCMJ, the

President added, *inter alia*, a factor that may be pled and proven to increase the punishment—the age of the child." *Id.*

Thus, Article 125 proscribed actions beyond its literal text, with the Manual delineating exactly what constituted a violation and how each violation would be punished. Put another way, Article 125 was not just one offense, but rather four offenses living in one statute—bestiality, sodomy between consenting adults, sodomy by force, and sodomy of a child under the age of 16. The multi-offense nature of Article 125 is evident considering that after the Supreme Court handed down *Lawrence v. Texas*, 539 U.S. 558 (2003), the military sodomy statute continued to operate in forcible-sodomy and sodomy-with-a-child cases. *See United States v. Banker*, 63 M.J. 657 (A.F. Ct. Crim. App. 2006), *aff'd*, 64 M.J. 437 (C.A.A.F. 2007). That Article 125 would continue to operate after its literal text was no longer enforceable indicates that the forcible-sodomy and sodomy-with-a-child "elements" actually created separate offenses.[7]

Finally, violating Article 125 resulted in a maximum of 20 years' confinement if one committed forcible sodomy or sodomy with a child, with confinement for 5 years in all other cases, while all forms of sodomy potentially resulted in dishonorable discharge and forfeiture of pay and allowances. (State's Ex. P4, ¶ 51(e)).

[7] Presumably, the bestiality proscriptions also survived *Lawrence*.

3. Only the provision of the out-of-state offense the offender was charged with should be compared to the Texas offense

Relying on language in *Anderson*, the court of appeals focused on the numerous ways that one could commit sodomy under Article 125. *Fisk*, 2017 Tex. App. LEXIS 11311, at *18-19. But, by doing so, the lower court ignored the fact that the *Anderson* Court was required to compare the entirety of the relevant out-of-state offense because "the judgment did not set out any elements of the offense." *Anderson*, 394 S.W.3d at 534. Instead, the out-of-state judgment in that case only contained what type of felony Anderson was convicted of and the sentence imposed. *Id*. Accordingly, the *Anderson* Court had little choice but to compare the entire out-of-state statute to Texas's indecency-with-a-child statute.

That is not the case here. Appellant's military judgment states that appellant committed sodomy with "a child under the age of 16 years." (State's Ex. P3.) Thus, there was no need to compare the bestiality, consenting-adult, or forcible-sodomy offenses of Article 125 to the Texas sexual-assault statute because the method of sodomy appellant was charged with was known to the trial court. That is to say, it is irrelevant that "Article 125 prohibits the unnatural carnal copulation with an animal," or that it "prohibits certain forms of consensual sex between adults," *Fisk*, 2017 Tex. App. LEXIS 11311, at *18, because it is known for certain that those were not the offenses appellant was found guilty of.

Prudholm supports comparing the method of offense alleged rather than the entire statute. There, Prudholm "had been previously convicted in California of the felony offense of sexual battery." *Prudholm*, 333 S.W.3d at 592 (emphasis added). The California statute itself was generally a misdemeanor, but it included aggravating conduct that elevated the offense to a felony. *Id*. at 596-97. When this Court compared the statutory elements, it included the aggravating element in its comparison. *Id*. at 597. Thus, it looked to the judgment to determine exactly what out-of-state offense was at issue and compared that portion of the statute.

Further, the *Prudholm* Court limited its comparison of the Texas sexual-assault statute to the provisions found in subsection (a)(1), which proscribed non-consensual conduct. *Id*. at 596, 597-98. That is, it did not compare the provisions that prohibited sexual assault of a child found in subsection (a)(2) because those provisions were in no way related to the California sexual-battery statute.

Simply, it is unlikely that the Texas legislature intended substantial similarity to be determined based on how other legislatures decided to lump criminal acts together. Instead, when, as here, it is known what specific provision of a statute an offender was convicted under, that portion of the out-of-state statute should be compared to the relevant portion of the applicable Texas offense.

b. The elements of the relevant statutes display a high degree of likeness

Comparing the UCMJ's sodomy-of-a-child statute with Texas's sexual-assault-of-a-child statute, the elements of the two statutes display a high degree of likeness because Article 125 criminalizes the same conduct that is criminalized by § 22.011(a)(2).

Article 125 protects children under the age of 16, while § 22.011 protects children under the age of 17. (State's Ex. P4, ¶ 51(b)(2)); Tex. Penal Code Ann. § 22.011(c)(1). The *Anderson* Court specifically stated, "if one state's statute sets the age for child rape at 16 while another sets it at 17, the statutory overlap is significant, though not precise." *Anderson*, 394 S.W.3d at 535 n.17. The court of appeals recognized that as well. *Fisk*, 2017 Tex. App. LEXIS 11311, at *17.

Further, the statutes cover the same conduct. Article 125 prohibits placing one's sexual organ in a child's mouth or anus. (State's Ex. P4, ¶ 51(c)). Likewise, § 22.011 prohibits penetrating the mouth of a child by the actor's sexual organ, or the anus of the child by any means—which would include penetration by the actor's sexual organ. Tex. Penal Code Ann. § 22.011(a)(2)(A), (B). In addition, Article 125 criminalizes taking into the person's mouth or anus the sexual organ of a child, while § 22.011 prohibits causing the sexual organ of a child to penetrate the actor's mouth or anus. (State's Ex. P4, ¶ 51(c)); Tex. Penal Code Ann. § 22.011(a)(2)(C).

The court of appeals noted that Article 125 "requires penetration" and "excludes genital-to-genital penetration from its purview," whereas § 22.011 "includes sexual contact, as well as genital-to-genital penetration." *Fisk*, 2017 Tex. App. LEXIS 11311, at *19. But that is irrelevant because the two statutes need not totally overlap. As the *Anderson* Court stated, "[T]here is no requirement of a total overlap, but the out-of-state offense cannot be markedly broader than or distinct from the Texas prohibited conduct." *Anderson*, 394 S.W.3d at 536 (emphasis added). The statutes in both *Prudholm* and *Anderson* were markedly broader than the relevant Texas statutes. Here, on the other hand, Article 125's child-sodomy provision is more circumscribed.

Moreover, as discussed above, how another state lumps criminal acts together should have no bearing on whether the two statutes are substantially similar. To do so would subject the "substantially similar" test to each state's idiosyncratic method of grouping offenses. In fact, § 22.011(a)(2) outlines a multitude of offenses which constitute sexual assault of a child. If the State of Franklin decided to have separate statutes for each of the methods outlined in § 22.011(a)(2), to conclude that Franklin's offenses could never, as a result, be substantially similar to § 22.011(a)(2) would undermine the purpose of § 12.42(c)—i.e., two strikes for certain repeat sex offenders.

The UCMJ in effect at the time of appellant's offense—the whole of which the trial court took judicial notice of—offers a perfect example. Article 125 did not punish penetration of a child's genitals, but Article 120 did. *See 1984 Manual for Courts-Martial*, Part IV, Art. 120, ¶ 45 (located on page 376 of the PDF file linked in footnote 3, *supra*). That Texas places genital, oral, and anal penetration of children in one statute, while Congress placed them in two, is not relevant to whether the offense appellant actually committed is substantially similar to § 22.011(a)(2).

The military sodomy statute that appellant violated was *the* statute that criminalized oral and anal sex with children, meaning it covered the same acts currently prohibited by § 22.011. Thus, comparing the elements of Article 125 and § 22.011, there is a high degree of likeness between them because they proscribe the same conduct. Therefore, the court of appeals erred when it concluded otherwise. And if, as requested above, this Court does roll back the current test, this would be the end of the inquiry.

c. The offenses advance the same specific interests

Even if the current test is retained, the court of appeals still erred. The court of appeals concluded that the "danger to society" that Article 125 was designed to prevent was unnatural, non-procreative sexual activities. *Fisk*, 2017 Tex. App. LEXIS 11311, at *20. That might be true of the consenting-adult provisions of the statute. It seems that, at the time, Congress felt it necessary to regulate sexual conduct between service members and other consenting adults. But, as discussed above, that was before *Lawrence v. Texas*.

Following *Lawrence*, the scope of Article 125 was scaled back considerably. *United States v. Banker*, 63 M.J. 657 (A.F. Ct. Crim. App. 2006), *aff'd*, 64 M.J. 437 (C.A.A.F. 2007). Military courts addressed constitutional challenges to Article 125 "on a case-by-case basis." *Banker*, 63 M.J. at 659. However, even though the language of the statute did not change for some time, it was still illegal to sodomize children. *See id*. at 660; *cf. Lawrence*, 539 U.S. at 578 (indicating that its holding did not protect sexual relationships between adults and minors). That is, the offense of sodomy with a child lived on, indicating that the concerns of the sodomy-with-a-child offense were quite different from those of traditional anti-sodomy laws, which were designed to prohibit non-procreative sex.

Frankly, it is unfathomable that the military prohibited sodomy with children because it was concerned about children not procreating. Instead, that offense—

like the prohibited conduct found in § 22.011(a)(2)—was designed to protect children from sexual abuse. The court of appeals's observation that "Article 125 expressly did not criminalize a defendant's sexual assault of a child if the sexual assault is by means of genital-to-genital penetration," *Fisk*, 2017 Tex. App. LEXIS 11311, at *20, again ignores that such conduct was prohibited by Article 120. That Congress prohibited sexual assault of children in two different statutes does not change the fact that its primary concern in prohibiting such conduct was to protect children from sexual assault.

As this Court has said, § 22.011 protects against "the severe physical and psychological trauma of rape." *Prudholm v. State*, 333 S.W.3d 590, 599 (Tex. Crim. App. 2011). Certainly, because it prohibits the same type of conduct, Article 125's sodomy-with-a-child provision serves the same interests. The court below erred when it held otherwise.

d. The offenses' class, degree, and punishment ranges are substantially similar

The second sub-prong "requires courts to determine if the impact of the elements on the seriousness of the offense is substantially similar." *Anderson*, 394 S.W.3d at 540 (internal quotation marks omitted). That is, "[t]he court must . . . determine if the class, degree, and punishment range of the two offenses are substantially similar." *Id*. at 536 (internal quotation marks omitted). The court of appeals concluded that the class, degree, and punishments were "extremely

similar[.]" *Fisk*, 2017 Tex. App. LEXIS 11311, at *21-22. In that regard, it was correct.

Under Article 125, a person convicted of sodomizing a child faced a maximum term of confinement of 20 years. (RR1 23-24; State's Ex. P4, ¶ 51(e)(2)). Generally, § 22.011(a)(2) is a second-degree felony punishable by 2-20 years' imprisonment. Tex. Penal Code Ann. § 12.33; *id*. § 22.011(f).[8] Thus, the maximum term of confinement for both offenses is 20 years.

In addition, one convicted under Article 125 forfeits all pay and allowances, while someone convicted of § 22.011 can be fined up to $10,000. (RR1 23-24; State's Ex. P4, ¶ 51(e)(2)); Tex. Penal Code Ann. § 12.33. Accordingly, both statutes have pecuniary consequences.

Article 125 also allows for dishonorable discharge from the armed forces. (RR1 23-24; State's Ex. P4, ¶ 51(e)(2)). Obviously, there is no equivalent to that provision in Texas law, but such a unique-to-the-military punishment does not mean the two punishments do not substantially overlap. If such military-specific provisions resulted in two statutes not being substantially similar, then virtually no

[8] Subsection (f)'s bigamy enhancement is of no consequence to the substantial-similarity analysis. That enhancement applies to a very specific situation not relevant here. If an out-of-state judgment happens to note that the offender was engaging in a bigamous relationship, then that enhancement may be relevant when comparing the punishments. But the enhancement applies to such a specific situation that to generally include it in the comparison would work to undermine finding any out-of-state statute "substantially similar" to § 22.011. Moreover, this is just another instance where the Texas statute is broader than Article 125 rather than the other way around.

military offense could be considered the "law[] of another state" requiring an automatic life conviction, which would run directly counter to this Court's holding in *Rushing*. *Rushing*, 353 S.W.3d at 863-68. Therefore, the discharge punishment does not undermine a finding of substantial similarity.

Admittedly, after analyzing the two statutes, it is true that they are not identical. But statutes need not be doppelgangers. Rather, as § 12.42 states, they need only be "substantially similar." Balancing the factors laid out by this Court, the scales tip in favor of finding that Article 125 and § 22.011 are substantially similar. Accordingly, this Court should reverse the court of appeals and reinstate appellant's three life sentences.

PRAYER FOR RELIEF

Counsel for the State prays that this Honorable Court REVERSE the court of appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in this brief is 5,734. I also certify that a true and correct copy of this brief was emailed to respondent Walter Fisk's attorney, Michael D. Robbins, Assistant Public Defender, at mrobbins@bexar.org, and to Stacey Soule, State Prosecuting Attorney, at information@spa.texas.gov, on this the 9th day of April, 2018.

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